

*United States Court of Appeals
for the Second Circuit*



**RESPONDENT'S
BRIEF**

"Original"

75-H209

71 CIV. 4278

(S.D. N.Y.)
(W.K.; Three-Judge Court)

75-4209 & 76-4103
(2nd Circuit)

Corrected
COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
AND THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SOUTHERN DISTRICT OF NEW YORK, CIVIL ACTION NO. 71-4278
(W.K. Three-Judge Court)

REA EXPRESS, INC.,

Plaintiff,

v.

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Defendants,

2nd CIRCUIT NOS. 75-4209 and 76-4103

REA EXPRESS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents,

and

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Intervening
Respondents.

ON PETITION FOR REVIEW OF ORDERS
OF THE INTERSTATE COMMERCE COMMISSION

JOINT BRIEF OF THE UNITED STATES OF AMERICA
AND THE INTERSTATE COMMERCE COMMISSION

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JOINT BRIEF OF THE UNITED STATES OF AMERICA
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ISSUES PRESENTED

1. Whether in 1959 the Commission properly approved REA's application under Section 20a(2) of the Interstate Commerce Act, 49 U.S.C. §20a(2), to issue promissory notes to stockholding railroads in exchange for REA's outstanding non-negotiable debt.

2. Whether the Commission's concurrent approval in 1959 of the joint application of REA and the stockholding railroads under Section 5(1) of the Interstate Commerce Act, 49 U.S.C. §5(1), for a new pooling arrangement, exempted the 1959 notes from the antitrust requirements of Section 10 of the Clayton Act, 15 U.S.C. §20.

3. Whether in 1975 the Commission, after determining that the 1959 notes were issued for adequate consideration and were exempted from the requirements of Section 10 of the Clayton Act, properly declined to rule on the Clayton Act status of REA's non-negotiable debt created in 1929.

STATUTES INVOLVED

1. Section 10 of the Clayton Act, 15 U.S.C. §20, reads in pertinent part:

No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any

person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission.

*

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*

Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

*

*

*

2. Section 5 of the Interstate Commerce Act, 49 U.S.C.

§5, reads in pertinent part:

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: Provided, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings,

or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises. . . .

* * *

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in sub-division (b) of this paragraph -

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise;

* * *

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * *

(11) The authority conferred by this section shall be exclusive and plenary, . . . and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are

relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction.

Section 20a(2) of the Interstate Commerce Act, 49

U.S.C. §20a(2), reads in pertinent part:

It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. . . .

STATEMENT

This action seeks to set aside and annul portions of the decisions and orders of the Interstate Commerce Commission in Finance Docket No. 20812, Railway Express Agency, Inc., Notes. Plaintiff-petitioner (hereinafter "REA", "petitioner" or "plaintiff") principally challenges the July 28, 1975, Report (hereinafter "Report"). The Commission's reopened proceeding followed the December 1972 order of this three-judge district court (Appendix B of the Report, p.220), granting the Commission's motion to intervene and stay further court proceedings in a civil action entitled REA Express, Inc. v. The Alabama Great Southern Railroad Company, et al., 71 Civ. 4278. The Report ^{1/} reexamined the Commission's Order of September 25, 1959 and concluded that the 1959 Order authorizing REA issuance of promissory notes to stockholding railroads in exchange for the railroads' 1929-1959 advances to REA "was correctly and appropriately issued" (Report at 218). REA's petition for reconsideration of the Report was denied by order of the ^{2/} Commission on February 11, 1976 (C.I. 222; App.79).

1/ This Order, noted at 307 I.C.C. 812 (1959) sub nom. Railway Express Agency, Incorporated Notes, is printed as Appendix A of the Report, 348 I.C.C. at 220.

2/ "C.I." refers to the Certified Index on file with the Clerk of the Southern District of New York and the Clerk of the Second Circuit. "App." refers to the Joint Appendix.

REA's petition for review has been filed with, and three judges are sitting simultaneously as, a three-judge district court and a circuit court in order to avoid any jurisdictional problem that might ensue from the 1975 Amendment to the Urgent Deficiencies Act, 28 U.S.C. 2321. See P.L. 901, 81st Congress, 2d Session.

A. Procedural History.

The complex nature and history of the instant proceedings are delineated in the comprehensive Report at pages 157-192 (App. 10-50). Briefly, in 1929 REA was formed as the successor of American Railway Express Company and became subject as a common carrier to the jurisdiction of the Interstate Commerce Commission. During the 1920's the railroads had lost substantial sums from their express business, while American Railway Express Company with a fixed percentage of revenues guaranteed had earned adequate profits. Unable to convince the Commission that their own losses constituted legal justification for increases in the Express company's rates and heeding the advice of Commissioner Eastman to purchase for their own protection the express company's stock, Express Rates, 1922, 89 I.C.C. 297, 320 (1924), most of the railroads in the United States purchased the assets of American Express Railway Company and established REA as a railroad-owned joint venture.

The assets of American Express Railway Company were purchased with funds raised through the public sale of \$32 million of 5 percent REA bonds. All REA capital stock was sold to 85 railroads for \$100,000. Standard Express Operating Agreements

(SEOA) between REA and railroads using the express service provided that REA would be the "exclusive agent" for all express business over the contracting railroads' lines, that REA would be constituted as a non-profit agency of the railroads, and that REA rail transportation revenues would be distributed monthly in proportion to the express business of the stockholding railroads. On February 11, 1929, the Commission in Securities and Acquisition of Control of Railway Express Agency, Incorporated, 150 I.C.C. 423, specifically authorized the pooling of earnings, the control of REA by the railroads, the sale of the bonds, and the distribution of the capital stock, pursuant to Sections 5(1), and 5(2) and 20a of the Interstate Commerce Act.

The SEOA contemplated that REA "rail transportation revenue" would be determined and then distributed to the railroads after semiannual deductions of \$800 per share of stock had been made to meet sinking fund obligations on the bonds. Due to substantial objections of certain railroads to this arrangement (see Report at 170-173; App.23-26), the exact method for handling sinking fund obligations was in limbo at the time of the Commission's hearing on REA's applications in January 1929 and the Commission was so informed by the chairman of the railroads' contract committee (Report at 175; App.28). In its February 1929 Report approving the SEOA, the Commission specifically declined to rule upon SEOA provisions for determination of rail transportation revenue and questioned the distortion of rail transportation revenues which would be caused by prior deduction

of sinking fund payments (150 I.C.C. at 434). In April 1929, REA's railroad directors altered the proposed method of covering the sinking fund obligation. Instead of deducting sinking fund payments from net distributable revenues, REA decided to deduct semiannually \$800 per share of stock from the "rail transportation revenues" payable to the stockholding railroads and credit like amounts to such stockholders as money advanced to REA. These amounts were carried on REA's books as "non-negotiable debt to affiliated companies - Advances;" interest was paid on the non-negotiable debt at 5.5 percent per annum.

In 1938, REA took advantage of prevailing interest rates, called the outstanding bonds, and issued a like amount of notes at an interest rate of 4 percent per annum. The notes, like the bonds, would mature in semiannual installments of \$800,000 and funds for repayment would be advanced by the stockholding railroads and treated as additional non-negotiable debt. The proposed repayment through advances is described in the Commission Report approving issuance of the 1938 notes.

Railway Express Agency, Incorporated, Notes, 230 I.C.C. 478, 479-480 (1938).

On September 21, 1959, a new SEOA between REA and the railroads was approved by the Commission, Division 3, pursuant to Section 5(1) of the Interstate Commerce Act.

Express Contract, 1959, 308 I.C.C. 545 (1959). On September 25, 1959, the Commission, Division 4, pursuant to Section 20a(2) of the Act, authorized REA issuance of promissory notes to the

railroads in exchange for the non-negotiable debt, which then totaled some \$27.5 million. Railway Express Agency, Incorporated, Notes, supra (Report at 218).

In 1968, after REA earnings performance failed to improve, most shareholder railroads deposited their REA stock in a voting trust and in 1969 sold 96 percent of the REA stock to REA Holding Corporation, a company that had been formed by an REA management group. The purchase price was \$2 million and warrants to purchase shares of the holding company. REA, under its new ownership, continued interest payments on the 1959 notes until September 1971 when REA filed the instant ^{3/}lawsuit against all holders of the 1959 notes.

B. The 1959 Operating Agreement and the the 1959 Notes.

Events precipitating the 1958 revision of the SEOA are described in Express Contract, 1959, supra, 308 I.C.C. at 545-546, and again in the Report at 188-189. The railroads had incurred multi-million dollar annual deficits in providing services and facilities to REA for express operations despite railroad

3/ REA's original complaint also named two railroads which formerly held REA notes and three assignees of such notes including the United States, as assignee of the Central Railroad of New Jersey. REA Express, Inc. v. Alabama Great Southern Railroad Company, 343 F. Supp. 851, 853 (S.D. N.Y. 1972). The United States has not actively participated in that capacity and is filing this brief jointly with the Commission solely as a statutory defendant on REA's petition to review Commission orders.

revenues from REA (Report at 189; App.42). Due to REA's status as a non-profit agency of the railroads, REA bore none of the losses (id.). A committee appointed by the REA board recommended a new SEOA which would put REA on a profit and loss basis and also recommended that, "in connection with the new contract,"^{4/} REA issue notes to evidence the non-negotiable debt^{4/} for the purpose "to make clear that the advances are in fact debts, and to establish formally the circumstances under which such notes becomes [sic] due and payable" (id.). On July 15-16, 1959, the REA board authorized execution of the new SEOA and issuance of the promissory notes (Report at 189-190; App. 42-43).

1. On July 23, 1959, REA and the railroads filed a joint application with the Commission for authorization of the new SEOA pursuant to Section 5(1) of the Interstate Commerce Act. On August 18, 1959, a hearing was held on the application before two Commission hearing examiners.^{5/} REA's president,

4/ The 1938 notes had been paid off by 1959.

5/ Certified copies of the transcript of this hearing have been lodged with the Clerk of the Southern District of New York and the Clerk of the 2nd Circuit and have been mailed to counsel for plaintiff-petitioner and defendants-respondents. The transcript is reproduced in the Joint Appendix, pages 110-178.

William B. Johnson, and three REA directors testified in support of the application. There were no protestants and no witness testified in opposition to the application.

The witnesses traced REA's past difficulties and emphasized that the principal objective of the new SEOA was to accord independence to REA and end REA's non-profit mode of operation in the hope of effecting greater efficiency, cost consciousness and improved performance by REA (Transcript of August 18, 1959, pp.13-15, 38, 53-54, 63; App. 124-126, 149, 164-165, 174). After explaining that REA liquidation had at times appeared almost inevitable and had been avoided only by stringent economies coupled with the railroads' acceptance of the new SEOA (Tr.11; App. 122), Mr. Johnson outlined the new plan for continued REA operations (Tr.12; App. 123):

Another feature of the plan is the issuance of notes to the railroads to cover the loans to the Express Company which have heretofore been carried on the Express's companies books simply as an open account debt to affiliated companies. An application for authority to issue these notes will be filed with the Commission in two or three days.

The 1959 SEOA provided measures for cutting REA's umbilical cord. Distribution to the railroads of REA revenues on a percentage basis would be replaced by a system whereby REA would purchase rail space on a basis related to the railroads' out-of-pocket expenses (Report at 190; App.43). REA could utilize other-than-rail carriers without the restrictions on such use contained in the prior SEOA (308 I.C.C. at 547). The SEOA provision that REA would have no taxable income was deleted (Report

at 190; App. 43). The conditions for withdrawal of dissatisfied participants were liberalized (308 I.C.C. at 550).

On September 21, 1959, the Commission, Division 3 (Commissioners Freas, Walrath and McPherson), approved the Section 5(1) pooling application.

2. Four days later, by Order of September 25, 1929, the Commission, Division 4 (Commissioners Arpaia, Walrath and ^{6/} Goff),^{6/} approved the issuance of the 5 percent non-negotiable promissory notes in exchange for the non-negotiable debt. (C.I. 2; Report at 218; App. 71). The application had been filed by REA on September 1, 1959, pursuant to Section 20a(2) of the Interstate Commerce Act (C.I. 1; App. 180). There were no protestants to the application and no hearing was held on the application.

In its Order, the Commission found that the proposed issuance of notes by REA:

(a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. . . .

Report at 219; App. 72.

6/ The names of the Division 4 Commissioners who issued the Order are listed on the Commission's Minute Records, certified copies of which have been lodged with the respective Clerks and have been mailed to counsel for plaintiff-petitioner and defendants-respondents.

C. The REA Lawsuit and the Commission's Reopened Proceedings.

The REA lawsuit, as described by Judge Metzner in REA Express Inc. v. Alabama Great Southern Railroad Company, supra, 343 F. Supp. at 855-856, contained, in essence, four claims. The first claim charges violations of Section 10 of the Clayton Act in the 1929 creation of the non-negotiable debt, the partial repayment of that debt between 1929 and 1938, the creation of additional non-negotiable debt in connection with the 1938 notes, the repayment of outstanding non-negotiable debt by means of the 1959 notes, and in the issuance of the 1959 notes without competitive bidding. The second claim, based on Section 20a of the Interstate Commerce Act and general contract law, charges that the non-negotiable debt is void since it never was submitted to the ICC for Section 20a approval and that the 1959 notes, which were issued as evidence of and in consideration for the non-negotiable debt, are thereby rendered invalid and unenforceable. The third claim, founded on general contract law, charges that the validity of the 1959 notes depended on the continued SEOA in the form approved by the Interstate Commerce Commission and that the notes are rendered null and void by the premature termination of the SEOA in 1968. The fourth claim charges breach of fiduciary duty by REA directors who authorized the acts described in the other three claims.

Three railroad defendants (the "C&O group") filed a motion to dismiss, contending that the complaint attacked

various Commission orders which can only be challenged in a proceeding under the Urgent Deficiencies Act (28 U.S.C. 2321-2325). Judge Metzner granted the motion in part, dismissing the portions of REA's complaint which he found challenged the Commission's 1959 order. ^{7/} 343 F. Supp. at 851.

Following this partial dismissal, REA filed a second complaint naming the United States as a party, and alleging jurisdiction under the Urgent Deficiencies Act. The Commission moved to intervene as a defendant under 28 U.S.C. 2323.

In August 1972, the Commission voted to reopen for reconsideration the 1959 proceeding authorizing issuance of the 1959 notes, and subsequently filed a motion in the district court to defer further court proceedings in the anti-trust case pending such reconsideration. The C&O group also filed a motion to dismiss REA's second complaint for failure to state a claim and requested a three-judge court to hear the motion. The United States filed a separate motion to dismiss. ^{8/}

7/ Judge Metzner held that the alleged violations of Section 10 of the Clayton Act and Section 20a of the Interstate Commerce Act in the issuance of the 1959 notes can only be determined by a three-judge district court, but that REA's attack under the Clayton Act on the legality of the railroads' actions prior to 1959 is properly filed in a one-judge court since the Commission never approved the creation of the non-negotiable debt in any of its orders. In holding that, as a procedural matter, the validity of the 1959 order and the consequent anti-trust immunity of the railroads can only be decided by a three-judge court, Judge Metzner did not reach the merits of the 1959 Order.

8/ Meanwhile, REA served a Notice to Produce seeking discovery on all Commission documents relating to the Commission's decision to reopen the 1959 proceedings. This Notice to Produce, together with subsequent REA petitions filed with the Commission in 1973, led to two separate Commission proceedings described in the Report (pp.164-166) and entitled "discovery on the merits" and "discovery on improprieties."

This three-judge district court was empaneled and a hearing was set on the motions to dismiss and on the Commission's intervention and deferral motions. In December 1972, this three-judge court granted the Commission leave to intervene and deferred further court proceedings pending Commission reconsideration of its September 25, 1959, Order. The court did not act on the motions to dismiss.

In explaining its action on the Commission's motion, the Court stated (Report at 220-221; App. 73-74):

. . . The Commission states, in a memorandum of September 5, 1972 in support of its motion, that "[o]n reconsideration the Commission will entertain whatever facts and arguments the parties desire to bring to its attention regarding the 1959 order." We read this as meaning what it says, namely, that reconsideration will be given not only to the suggestion, advanced in the Commission's memorandum, that the non-negotiable debt perhaps "in fact represented but railroad equity in REA," which has aroused understandable concern on the part of the railroad defendants, but also whether, in the Commission's words, "the 1959 order was correctly or appropriately issued" on the contrary assumption and, in addition, whether as stated in its memorandum of November 17, 1972, the 1959 order, or indeed prior orders, did exempt the 1959 notes and the non-negotiable debt from the requirements of the antitrust laws" and, more specifically, "whether the notes were approved in furtherance of a section 5 transaction approved by the Commission." Our action on the Commission's motion is predicated on the assumption that it will entertain all the proposals outlined in its memoranda and, indeed, any others that may be appropriate.

The defendant railroads and, in respect to the suggestion concerning antitrust immunity, the United States contend that the Commission is without power to reconsider, clarify, revise or supplement its orders after so many years. We agree that its right to do so is by no means plain. See Davis, Administrative Law Treatise §18.09 (1958 ed. & 1970 supp.). However, we see no reason to pass on the

Commission's powers until we know, as neither we nor it now can know, namely, what it desires to do.

In January 1973, REA filed an Order to Show Cause seeking to vacate the stay of the judicial proceedings, and requesting a preliminary injunction to restrain the Commission from conducting its proceeding.^{9/} This three-judge court denied REA relief, ____ F. Supp. ____ (S.D. N.Y. 1973), and the Supreme Court affirmed on appeal, 412 U.S. 934.

INTRODUCTION TO ARGUMENT

Following the Commission's January 1973 reopening of the proceeding for further consideration of the issuance of the 1959 notes, the parties engaged in voluminous discovery extending back to 1928 and submitted more than 1,000 pages of briefs and verified statements. The discovery, verified statements and briefs enabled the Commission to reconstruct in considerable detail the history of the railroads' relationship with REA. However, the historical reconstruction was directed toward the Commission's prime responsibility in this lawsuit -- reconsideration of the validity of the 1959 notes and the antitrust implications of the Commission's 1959 authorization of the notes.

REA purports in its petition for review to confine itself "to a discussion of the merits of the Commission's [1975] decision" (Br.2). Yet throughout its Brief petitioner focuses on REA's present bankruptcy status (e.g., Br.8, 14, 18, 20, 26)

9/ REA also sought to file a third complaint and certain discovery orders. The court deferred action on these requests.

and assails the "Commission's 1975 indifference to the public interest" (Br.25). In doing so, REA forgets that the critical year in this reopened proceeding is 1959, not 1975; that the Commission is a regulatory agency not a bankruptcy court; and that REA's bankruptcy has no relevance to the issues which were pending before the Commission in its reopened proceeding and which are now pending before this Court on review of the Commission's proceeding.

ARGUMENT

I.

THE COMMISSION IN 1959 PROPERLY APPROVED REA'S APPLICATION UNDER SECTION 20a(2) OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. §20a(2), TO ISSUE PROMISSORY NOTES TO STOCKHOLDING RAILROADS IN EXCHANGE FOR REA'S OUTSTANDING NON-NEGOTIABLE DEBT.

The Transportation Act of 1920 added Section 20a to the Interstate Commerce Commission Act. This section brought the issuance of securities by railroads under the "exclusive and plenary" control of the Commission.^{10/} Section 20a(7). Before a carrier may issue notes or other securities it must obtain the approval of the Commission. Section 20a(2). The Commission may hold hearings "if it sees fit" (Section 20a(6)).

The Commission may authorize such issuance if it finds that it "(a) is for some lawful object within [the applicant's] corporate purposes, and compatible with the public

^{10/} Section 214 of the Act, 49 U.S.C. §214, makes Section 20a applicable to motor carriers as well.

interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public, and (b) is reasonably necessary and appropriate for such purpose" (Section 20a(2)).

Here, the Commission in its 1959 Order made those exact findings (supra, p.13; Report at 219; App. 72). The sole therefore, is whether the Commission upon reconsideration of its 1959 Order erred in concluding "that the September 25, 1959 order was 'correctly' and 'appropriately' issued" (Report at 213; App. 66).

In 1958, railroad dissatisfaction with the existing SEOA and massive railroad deficits from express business led the railroads to consider liquidation of their non-profit express agency. However, after months of committee study, the railroads decided instead to change the SEOA, so that REA would become an independent corporation free to contract with non-rail carriers and thus free to promote competitive practices which could prove detrimental to certain railroads or railroad interests.

In hindsight, the post-1959 competition from motor and air carriers, coupled with the pre-1959 railroad deficits from their express business, may have made it unlikely that REA would be able to avoid liquidation. But the Commission, while obligated to look to the future, cannot be expected to divine the future. In 1959 REA liquidation was by no means a certainty. If it had been a certainty in 1959, then it appears strange that a sophisticated and knowledgeable group of REA

officers would have purchased REA in 1969 for some \$29 million (\$2 million in cash plus \$27 million in REA obligations on the 1959 notes).

It is difficult to understand petitioner's assertion that "[u]ltimate liquidation of RFA was made inevitable by the 1959 notes" (Br. 18). The notes simply evidence the already existing advances made to REA by the railroads. The debt was already there; it was not created by the notes. Moreover, notes would tend to establish a company on a more independent basis than would advances, since the latter are essentially demand notes subject to call at any time. Similarly, carrying the debt as advances with the concomitant uncertainties of call at any time would tend to discourage shippers from entering into long-term contracts with REA. In any event, as found by the Commission (Report at 206; App. 59), the non-negotiable debt constituted both true debt and adequate consideration for the notes.

Even if the non-negotiable debt was created in violation of Section 10 of the Clayton Act -- a question not reached by the Commission -- the non-negotiable debt would not thereby be void for all purposes. See Kelly v. Kosuga, 358 U.S. 516 (1958). Cf. Klinger v. Baltimore & Ohio Railroad Company, 432 F.2d 506 (2nd Cir. 1970); Walker v. United States, 208 F. Supp 388 (W.D. Tex. 1962), affirmed, 372 U.S. 526. We have found no authority to the contrary, nor can we envision any public policy reason why issuance of the 1959 notes in exchange for the pre-1959 non-negotiable debt could not be authorized in order to formalized a schedule and manner for repayment of the already existing debt.

The Commission's 1959 authorization of the notes was well within the proper exercise of its "exclusive and plenary" control (Section 20a(7)) over the issuance of a carrier's securities. Accordingly, there is no reason why the Commission's findings that the issuance was for a lawful object, and necessary or appropriate for or consistent with the proper performance by REA of service to the public, should be set aside.

Denver & Rio Grande Western Railroad Co. v. United States, 387 U.S. 485 (1967), relied on by petitioner (Br.11, 22), supports our position. In Denver & Rio Grande, the Supreme Court held that generally the Commission must consider control and anticompetitive consequences before approving a stock issuance under Section 20a(2), id. at 498, and that the Commission exceeded its discretion in approving a Section 20a(2) application while deferring Clayton Act questions until it would be presented with the opportunity to consider those questions in a related control application under Section 5(2) of the Act. Id. at 501.

Here, the Commission on September 21, 1959 had already approved REA's Section 5(1) application for a new SEOA. The hearing on that application focused on the opportunity the new SEOA would accord REA to become independent of the railroads and a competitive factor in the marketplace. The Commission Report, supra, 308 I.C.C. 545, reflected that focus. Thus, the Commission in 1959 had in fact considered control and anticompetitive consequences before approving REA's Section 20a(2) application

on September 25, 1959.

Moreover, the Commission at the Section 5(1) hearing was informed that the issuance of notes in exchange for open account debt was an integral feature of the new REA plan and that a Section 20a(2) application would soon be filed with the Commission. Commissioner Walrath was a member of Division 3, which approved the Section 5(1) application on September 21, 1959, and a member of Division 4, which approved the Section 20a(2) application four days later. In these circumstances, it cannot be said that the Commission had failed to take antitrust considerations into account when it approved issuance of the notes.

II.

THE COMMISSION'S CONCURRENT APPROVAL IN 1959 OF THE JOINT APPLICATION OF REA AND THE STOCKHOLDING RAILROADS UNDER SECTION 5(1) OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. §5(1), FOR A NEW POOLING ARRANGEMENT, EXEMPTED THE 1959 NOTES FROM THE ANTITRUST REQUIREMENTS OF SECTION 10 OF THE CLAYTON ACT, 15 U.S.C. §20.

Section 5(11) of the Interstate Commerce Act gives the Commission power to grant antitrust immunity to certain mergers, consolidations and pooling agreements of carriers. The precursor of Section 5(11) was added to the Interstate Commerce Act by the Transportation Act of 1920. United States v. Navajo Freight Lines, Inc., 339 F. Supp. 554, 556 (D. Col. 1971), appeal dismissed sub nom. Garrett Freight Lines, Inc. v. United States, 405 U.S. 1035 (1972). That Act replaced the previous policy of free

competition between carriers with a policy of regulated mergers.

St. Joe Paper Co. v. Atlantic Coast Line Railroad Co., 347 U.S. 298, 315 (appendix) (1954); U.S. v. Navajo Freight Lines, Inc., supra at 556. Although Section 5(11) does not authorize the Commission to "ignore" the antitrust laws, the Commission may approve Section 5 applications which would otherwise be prohibited by antitrust laws. Minneapolis & St. Louis Railway Co. v. U.S., 361 U.S. 173, 186 (1959).

By its terms, Section 5 approval relieves carriers from the operation of the antitrust laws "insofar as may be necessary to enable them to carry into effect the transaction so approved. . ." (Section 5(11)). In 1959, the Commission considered REA's Section 20a(2) application in conjunction with REA's Section 5(1) application. Although the separate applications were granted four days apart and by different Divisions, Division 3 before granting the Section 5 application was made aware by REA's president of the forthcoming Section 20a(2) application and of the integral connection between the notes and the new SEOA (Report at 212 App. 65; supra, p. 12). Indeed, one of the three Division 3 Commissioners who approved the Section 5(1) application also approved the Section 20a(2) application four days later. Consequently, the Commission in its 1975 Report and "no difficulty in concluding that the 'notes were approved in furtherance of a section 5 transaction approved by the Commission'" (Report at 212). Accord, REA Express, Inc. v. Alabama Great Southern Railroad Company, supra, 343 F. Supp. at 859.

There is nothing in Section 5(11) "which authorizes [the Commission] to determine and declare the particular laws within the scope of paragraph (11) from which a carrier shall be relieved. The terms of this paragraph are self-executing and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do. Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118 (1948)."
Chicago, Saint Paul, Minneapolis & Omaha Railway Company Lease, 295 I.C.C. 696, 702 (1958). Thus, the Section 5(1) authorization of September 21, 1959, was self-executing, exempting REA and the railroads from the antitrust strictures of Section 10 of the Clayton Act in their SEOA and in the issuance of notes intimately connected to the SEOA. Nor was there need for the Report of September 21, 1959, or the Order four days later to refer specifically one to the other, since they were simultaneous approvals, to be interpreted as a "single determination" (Walker v. U.S., supra, 208 F. Supp. at 393) "growing out of one transaction" (id.).

III.

IN ITS 1975 REPORT, THE COMMISSION, AFTER DETERMINING THAT THE 1959 NOTES WERE ISSUED FOR ADEQUATE CONSIDERATION AND WERE EXEMPTED FROM THE REQUIREMENTS OF SECTION 10 OF THE CLAYTON ACT, PROPERLY DECLINED TO RULE ON THE CLAYTON ACT STATUS OF REA'S NON-NEGOTIABLE DEBT CREATED IN 1929.

Petitioner criticizes the Commission for failing to rule that the non-negotiable debt was created and maintained in violation of Section 10 of the Clayton Act. We submit that the Commission properly declined to make a specific finding on the antitrust implications of that debt.

As noted by the Commission (Report 213-214; App. 66-67), this proceeding was reopened for reconsideration of the 1959 Order approving issuance of the notes in exchange for the non-negotiable debt. The Commission determined that the non-negotiable debt constituted real debt and adequate consideration for the 1959 notes and that the Commission's 1959 Order exempted the notes from antitrust ramifications. The Commission also pointed out that the Supreme Court's decision in Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973), and Bangor Punta Operations, Inc. v. Bangor & Aroostock Railroad Co., 417 U.S. 703 (1974), may control the ultimate disposition of the non-negotiable debt question.

The Commission was not unmindful of the primary jurisdiction doctrine described in great detail in a motor carrier case, United States v. Navajo Freight Lines, Inc., supra, 339 F. Supp. 554. Here, of course, both petitioner and intervening respondents urged the Commission that the court, not the Commission, was the proper forum for resolution of the antitrust implications of the non-negotiable debt. However, despite such

urging, the Commission would have ruled on the status of the non-negotiable debt under the antitrust law if its ruling would have assisted this Court "in concluding its proceeding" (Report at 218; App. 71) (emphasis in original) or if this Court "were to specifically so direct [the Commission]."

Although the primary jurisdiction issue relative to the non-negotiable debt under the antitrust laws is a close question, see United States v. Navajo Freight Lines, Inc., supra at 561, this Court's jurisdiction over the issue "is not thereby ousted, but only postponed" (United States v. Philadelphia National Bank, 374 U.S. 321, 353 (1963)). Accordingly, this Court may make the initial determination on that antitrust question or direct the Commission to do so. In the interest of expeditious determination, we suggest the former course.

11/

11/ The United States is of the view that this Court is the proper forum for resolution of the status of the non-negotiable debt under the antitrust laws.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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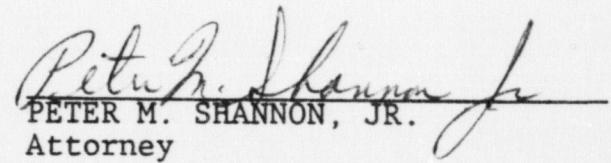
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